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No. 76-1298

In the Supreme Court of the United States
OCTOBER TERM, 1976

JAMES LEE WORTHINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-54) is reported at 544 F. 2d 1275. The order of the district court (Pet. App. 17-25) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55-56) was entered on January 10, 1977. A petition for rehearing was denied on February 16, 1977 (Pet. App. 57). The petition for a writ of certiorari was filed on March 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the seizure of contraband drugs from petitioner's aircraft violated the Fourth Amendment.

(1)

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing 843 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).¹ He was sentenced to three years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed, one judge dissenting (Pet. App. 26-54).

The undisputed evidence is set forth in detail in the opinion of both lower courts (Pet. App. 17-21, 28-30). Briefly, it showed that at 6:30 p.m. on April 27, 1974, Agent Gary Morrison of the Drug Enforcement Administration received a telephone tip that an airplane with its rear seats removed had just landed at the Harlingen, Texas, airport and that the plane had been piloted by a bearded young man. Agent Morrison was aware that the aircraft described by the caller was the type commonly used to transport contraband. Shortly after receiving this message, the agent received another telephone call, this time from a previously reliable informant, stating that a bearded young man had just arrived in Harlingen and would depart in a plane loaded with marijuana. The informant also reported that the man would be meeting other persons at a green mobile home behind the Casa Blanca Motel in Harlingen (Pet. App. 28).

Agent Morrison immediately began an investigation into the allegations. He ascertained that the aircraft in question had recently been leased to petitioner and that a green trailer home existed at the precise location described by the informant. At Harlingen Airport, Agent Morrison met with

three Customs agents, one of whom had seen the plane land and had discovered that it contained boxes marked "Cessna Aircraft Parts" in place of the rear seats. The agents kept the airplane under surveillance and placed an electronic "beeper" on the plane to assist in the tracking (Pet. App. 28-29).

In the early morning of April 28, 1974, the Customs agents observed petitioner and another man take off in their aircraft. The agents followed in another airplane and tracked petitioner to Hooks Airport in Houston, where he landed, unloaded several boxes from his plane, replaced the rear seats, and departed on foot. The agents examined the boxes and found that they were empty. A D.E.A. agent at the Houston airport informed the Customs agents that petitioner was suspected of drug dealing in the Houston area (Pet. App. 29).

Later the same day, petitioner returned to Hooks Airport, again removed the rear seats from the plane, and departed. The Customs agents followed him to Harlingen Airport, whence petitioner proceeded to the green trailer home behind the motel. At 8:30 p.m., petitioner went back to the airport, flew his airplane to Brownsville, Texas, for refueling, and then returned to Harlingen. Fifteen minutes later he took off once more, this time traveling to Mid-Valley Airport in Weslaco, Texas. He remained there for another fifteen minutes before departing for Victoria, Texas. The Customs surveillance plane landed at the Victoria airport shortly after petitioner's arrival and taxied to an area in front of petitioner's aircraft. As one of the agents left the Customs plane and approached petitioner with a flashlight and drawn gun, he immediately observed burlap sacks containing brick-like objects inside petitioner's plane. Based upon his experience, the agent concluded that

¹Following the district court's denial of petitioner's motion to suppress, petitioner submitted the case upon the testimony adduced at the suppression hearing.

the sacks contained marijuana. He therefore ordered petitioner to raise his hands and remain seated in the aircraft (Pet. App. 29-30).

Later that evening petitioner and his plane were flown to Corpus Christi, Texas, where the agents confirmed that the burlap sacks contained marijuana. After receiving *Miranda* warnings, petitioner made several incriminating statements about his involvement in the drug operation (Pet. App. 30; Tr. 123-130).

ARGUMENT

Both the majority and dissent in the court of appeals assumed that the validity of the Customs agents' seizure of the marijuana from petitioner's airplane depended solely upon whether the agents' encounter with petitioner at the Victoria airport constituted a lawful investigative stop under *Terry v. Ohio*, 392 U.S. 1. The majority held that the agents' actions amounted to a *Terry*-type stop for which they had a reasonable suspicion and that this suspicion ripened into probable cause once the beam of the flashlight revealed the "brick-like objects" in the airplane (Pet. App. 33). Judge Goldberg, on the other hand, was of the view that "the initial moment of confrontation" between petitioner and the agents constituted an arrest without probable cause (*id.* at 38). There is no need for the Court to resolve this dispute, however, since the district court correctly held, as its primary ground of decision, that the agents' stop of petitioner, whether or not termed an "arrest," was supported by probable cause.

1. The district court's conclusion that the Customs agents had probable cause to arrest petitioner and to search his airplane, prior to the confrontation at the Victoria airport, is supported by the evidence. An informant of proven reliability had provided information about petitioner's

illegal activities, and the agents' surveillance had confirmed a number of the essential details: the informant indicated that a bearded young man, which accurately described petitioner, would arrive in Harlingen, Texas, by airplane, would meet others at a particular mobile home, and would ultimately depart with his plane loaded with marijuana; the agents' investigation at Harlingen, ten miles from the Mexican border, established the existence of the person, the plane, and the mobile home. See *Draper v. United States*, 358 U.S. 307. Moreover, the agents' further investigation revealed that petitioner was suspected of drug dealing in the Houston area, and they personally observed him engage in the erratic behavior of hauling and unloading a cargo of empty crates, removing and replacing the rear seats of his airplane, and traveling from airport to airport in South Texas for no apparent legitimate reason (Pet. App. 23).

Although petitioner argues (Pet. 10) that each fact known to the agents, if viewed in isolation, may have had an innocent explanation, the district court properly focused upon the totality of the circumstances in evaluating the information upon which the Customs agents undertook the arrest and search. See *Ker v. California*, 374 U.S. 23, 36; *United States v. Brennan*, 538 F. 2d 711, 720 (C.A. 5), certiorari denied, No. 76-701, February 22, 1977. A combination of the informant's tips, information received from the D.E.A. agent in Houston, and their first-hand observations provided the Customs agents, even before they encountered petitioner at the Victoria airport, with probable cause to believe that petitioner was engaged in a violation of the narcotics laws.

2. Even assuming that the Customs agents did not have probable cause to arrest petitioner prior to their confrontation, nevertheless, as even Judge Goldberg conceded in dissent (Pet. App. 38), probable cause clearly existed once

the agents observed the "brick outlines" in petitioner's aircraft. Furthermore, as the court of appeals unanimously held (*id.* at 33, 38), the facts known to the agents prior to the confrontation gave them at least a reasonable suspicion to effect an investigative stop. Petitioner contends, however, that the agents' actions in blockading his plane and approaching him with a drawn gun actually constituted an arrest, for which probable cause was required.

This contention was properly rejected by the two courts below. In the circumstances of this case, the mere fact that the agents determined to approach petitioner while carrying a gun did not transform a concededly lawful investigative stop into an unlawful arrest. As the district court noted (Pet. App. 24), "[t]he agents, knowledgeable in the ways of the narcotics traffic, had reason to fear for their lives as they jumped from their plane in a dark, unpopulated area of the airstrip." See also Pet. App. 33, n. 3. The Fourth Amendment does not require law enforcement officers foolishly to accept such risks before they may interrogate a suspect. See *Adams v. Williams*, 407 U.S. 143, 145; *Terry v. Ohio*, *supra*, 392 U.S. at 23-24.

Petitioner's suggestion (Pet. 9) that this holding conflicts with *United States v. Strickler*, 490 F. 2d 378 (C.A. 9), is incorrect. As the Ninth Circuit has emphasized in subsequent opinions, *Strickler* holds only that a law enforcement officer may not draw his gun when effecting a lawful investigative stop unless, as in this case, the weapon is reasonably necessary for the officer's protection. See *United States v. Coades*, 549 F. 2d 1303, 1305 (C.A. 9); *United States v. Russell*, 546 F. 2d 839, 840 (C.A. 9); *United States v. Richards*, 500 F. 2d 1025, 1028 (C.A. 9), certiorari denied, 420 U.S. 924. See also *United States v. Maslanka*, 501 F. 2d 208, 213, n. 10 (C.A. 5), certiorari denied *sub nom. Knight v. United States*, 421 U.S. 912.

In any event, even were petitioner correct in his assertion that he was arrested a split second before the agents acquired probable cause,² the drugs seized from his airplane were not the fruit of the illegal arrest. Petitioner had voluntarily landed his airplane at the Victoria airport, the agents lawfully taxied alongside the plane, and they were standing in a place where they had a right to be when they observed the bricks of marijuana. See *United States v. Lee*, 274 U.S. 559, 563. The search and seizure were therefore the product of the agents' admittedly lawful investigative stop and were not the fruit of any arrest that may have occurred when the agents drew their guns for self-protection.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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²It is undisputed that the agents' sighting of the packages of marijuana, which supplied probable cause for petitioner's arrest, occurred virtually simultaneously with their armed advance toward the airplane. Thus, petitioner's attempt to distinguish the time periods is "only of gossamer strength [and] ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." *Jones v. United States*, 362 U.S. 257, 266. See also *Chapman v. United States*, 365 U.S. 610, 616.